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10 Attorneys for Vadonna G.
11 and Jeffrey Rivera

12 IN THE UNITED STATES DISTRICT COURT
13
14 FOR THE DISTRICT OF NEVADA

15 In re:

16 DAVID JOHN KAPLAN

17 Debtor.

18 DAVID JOHN KAPLAN,

19 Plaintiff

20 v.
21

22 VADONNA G. RIVERA and JEFFREY RIVERA,

23 Defendants.
24

Case No. 3:11-cv-00772-RCJ-VPC

**REQUEST FOR ORAL
ARGUMENT**

Hearing Date:
Hearing Time:
Courtroom:

1 DAVID JOHN KAPLAN,

Case No. 3:13-CV-145-RCJ-WGC

2 Plaintiff

3 v.

4 SHARON ELIZABETH CONNELL; CARLOS
5 TOMAS ARAIZA; AND JOSE RAMON NUNO-
6 GODINEZ,

7 Defendants.
8

9 **MOTION TO CONSOLIDATE**

10 Defendants VADONNA G. RIVERA and JEFFREY RIVERA (collectively, "the Riveras"),
11 by and through their counsel of record Larry Nelson, Esq. and Courtney G. Forster, Esq., file this
12 Motion to Consolidate. This Motion is made and based upon Federal Rule of Civil Procedure 42(a),
13 the following memorandum of points and authorities, the pleadings on file in this case, and any oral
14 argument the court chooses to entertain.

15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 **I. Introduction**

17 David Kaplan ("Kaplan") has filed two lawsuits to recover damages for back injuries he has
18 allegedly suffered. In the first lawsuit, Kaplan claims that a non-contact encounter with the Riveras'
19 dog caused him so much harm that he has incurred approximately \$326,250.00 in medical expenses
20 and lost wages. In the second lawsuit, Kaplan claims that a rear-end traffic accident occurring one
21 year after the dog encounter caused him so much harm that he incurred approximately \$328,000.00
22 in medical expenses and lost wages.

23 Kaplan is claiming damages from the Riveras for medical expenses incurred both before and
24 after the traffic accident. Kaplan's treating physician has testified that it is very difficult, if not
25 impossible, to determine how much of Kaplan's purported injuries are due to the dog encounter and
26 how much is due to the traffic accident. Kaplan's own damages calculations show that he is seeking
27 money from the Riveras for damages, such as body damage to his vehicle and lost wages, that
28 unquestionably arose out of the traffic accident.

1 Consolidation of these two lawsuits will ensure that there is no overlap or inconsistency in
 2 the damages awarded to Kaplan for these claimed injuries. To keep the two cases apart would waste
 3 judicial resources, requiring two separate trials on nearly identical damages claims, and would lead
 4 to confusion in the finders of fact. For these reasons, the two lawsuits must be consolidated.

5 **II. Factual Summary**

6 In his First Amended Complaint, Kaplan alleges that, on March 18, 2009, the Riveras' dog
 7 jumped up against the door of the car in which Kaplan was sitting. *See* First Amended Complaint,
 8 attached as Exhibit "1." Although he was not touched or otherwise contacted by the dog in any
 9 way, Kaplan alleges that the dog's approach caused him to "turn[] and twist[] his body with great
 10 force and violence to avoid being bitten." Exhibit 1, 3:10-11.

11 Eleven months after his encounter with the Riveras' dog, in February 2010, Kaplan began
 12 seeing Dr. James R. Rappaport ("Dr. Rappaport"), a specialist in spinal surgery and orthopaedic
 13 surgery, to address issues of an abnormal disk and associated facet joints bulging in his back. *See*
 14 Deposition of Dr. James R. Rappaport, attached as Exhibit "2," at 5:21-6:3; 8:12-18. Kaplan told
 15 Dr. Rappaport that his back issues were the result of his encounter with the Riveras' dog, though
 16 Dr. Rappaport was unable to determine whether that encounter was in fact the cause of the apparent
 17 injury. Exhibit 2, 15:20-16:9. Dr. Rappaport performed surgery on Kaplan's back on March 16,
 18 2010. Exhibit 2, 23:14-15. Less than two months later, on May 5, 2010, Kaplan indicated to Dr.
 19 Rappaport that there was "90-percent improvement of his pre-operative symptoms, in other words,
 20 90-percent of the symptoms were gone as of that date." Exhibit 2, 24:9-12.

21 However, the night before this May 5, 2010 meeting with Dr. Rappaport at which he
 22 reported his symptoms to be 90% cured, Kaplan was allegedly involved in a rear-end collision with
 23 two other vehicles. According to Kaplan, at approximately 8:30 pm, Kaplan was stopped at a red
 24 light at an intersection in Reno, Nevada. *See* Complaint, attached as Exhibit "3," at 3:17-18. While
 25 he was stopped at this intersection, Kaplan alleges that a sports utility vehicle rear-ended the pickup
 26 truck stopped behind Kaplan, causing the pickup to rear-end Kaplan's own sports-utility vehicle.
 27 Exhibit 3, p. 2-4. Kaplan claims that, as a result of this collision, he sustained "serious injuries,
 28 especially to his neck, shoulders and back." Exhibit 3, 4:19-20.

1 The next month, in June 2010, Kaplan reported a deterioration in his condition to Dr.
2 Rappaport. Exhibit 2, 24:23-25:1. Although he had previously reported a 90% improvement to his
3 symptoms, by June 2010 Kaplan stated that his pre-surgery symptoms had only decreased by 30%.
4 *Id.* Kaplan had an MRI performed on June 11, 2011; Dr. Rappaport testified that this MRI showed
5 “facet degenerative changes” and that Kaplan had reported increased pain after the May 4, 2010
6 traffic accident, but that he could not say the degeneration was related to the traffic accident based
7 on those factors. Exhibit 2, 28:24–29:4. However, Dr. Rappaport did testify that “the timing showed
8 that [the traffic accident] was related because he was doing well, then following the accident he had
9 additional complaints, and took a step back, which seemed to make it related to the accident.”
10 Exhibit 2, 29:5-8.

11 On May 16, 2011, just over two years after his encounter with the Riveras’ dog and one year
12 after his traffic accident, Kaplan filed his lawsuit against the Riveras (“Rivera Lawsuit”) claiming
13 that his injuries (the turning and twisting motion he allegedly performed to avoid the dog) caused
14 him to suffer pain and required medical attention and surgical care. Exhibit 1, 3:16-17. Kaplan
15 claimed damages for “medical treatment and attention, including hospitalization” in excess of
16 \$100,000.00, plus lost wages in the amount of \$26,250.00 because he was unable to “perform self-
17 employment duties” as a “tax preparer and business consultant” for a period of 75 weeks, or
18 approximately one and a half years. Exhibit 1, 5:5-16.

19 Two months later, on July 12, 2011, Dr. Rappaport performed a second surgery on Kaplan’s
20 back. Exhibit 2, 34:21–35:1.

21 On March 9, 2012, Kaplan submitted his FRCP 26(a)(1) initial disclosures in the Rivera
22 Lawsuit. In those disclosures, Kaplan claimed that his medical damages were “in excess of
23 \$300,000.00,” but he was unable to make a final calculation as he was awaiting billing records. *See*
24 Plaintiff David John Kaplan’s Initial Disclosures, attached as Exhibit “4,” at 7:25-27. There was no
25 computation of the \$300,000.00 in claimed damages, nor were these damages broken down by
26 category. *Id.* Kaplan also did not explain why his claimed damages had increased from
27 approximately \$126,250.00 to \$300,000.00 in the intervening months after filing his First Amended
28 Complaint. Kaplan also did not identify any damages for allegedly lost wages in these mandatory

disclosures. *Id.* Kaplan has never supplemented these disclosures with an updated calculation of his damages. *See* Declaration of Larry Nelson, Esq., filed with this Motion.

Two months after claiming these damages against the Riveras, on May 3, 2012, Kaplan filed a lawsuit against Sharon Elizabeth Connell, Carlos Tomas Araiza, and Jose Ramon Nuno-Godinez related to his traffic accident ("Traffic Lawsuit"). In that Complaint, Kaplan alleged that, as a result of his injuries, he has "reasonably incurred necessary expenses for medical and surgical advice and treatment, X-rays, hospitalization, physical therapy, chiropractic treatments, and medicinal supplies in the approximate amount of \$280,000." Exhibit 3, 4:21-24. Kaplan also alleged that he was "unable to work on a full time basis for several months," suffering loss of wages in the amount of \$48,000. Exhibit 3, 5:2-5. Kaplan did not explain how any of these damages were calculated. *Id.*

III. Argument

Federal Rule of Civil Procedure 42(a) provides that, if "actions before the court involve a common question of law or fact," the court may consolidate those actions. This decision is within the broad discretion of the district court. *In re Adams Apple, Inc.*, 829 F.2d 1484, 1487 (9th Cir. 1987). In addition to common questions of law or fact, the district court must "weigh the interests of judicial convenience against the potential for delay, confusion, and prejudice caused by consolidation." *Paxonet Communications, Inc. v. TranSwitch Corp.*, 303 F.Supp.2d 1027, 1028 (N.D. Cal. 2003).

Although the factual circumstances that gave rise to these two lawsuits do not overlap, the damages claimed by Kaplan in each of them unquestionably do. This overlap in damages is very likely to lead to incompatible verdicts between the two cases, prejudicing the defendants and wasting this Court's judicial resources. Furthermore, because the facts that give rise to the two lawsuits are very straightforward, while the testimony of damage allocation related to those two incidents are fairly complex, the likelihood of confusion as a result of consolidation is very low: upon consolidation, the finder of fact will be able to hear the full set of circumstances surrounding Kaplan's alleged back injuries and can make the appropriate decision on allocation among all involved parties. For these reasons, the two lawsuits must be consolidated.

1 A. ***Common Questions of Fact Exist Between the Two Lawsuits.***

2 The primary concern for courts in determining whether to consolidate lawsuits is whether
3 they involve a “common question of law or fact.” FRCP 42(a). Both the Rivera Lawsuit and the
4 Traffic Lawsuit involve extremely similar, and overlapping, damages claims. In both lawsuits,
5 Kaplan is seeking overlapping – or identical – damages for medical expenses, lost wages, and
6 damage to his vehicle. These coinciding questions of fact mandate consolidation of the two cases.

7 i. **Kaplan’s back surgeries constitute overlapping damages in both**
8 **lawsuits.**

9 Kaplan’s purported back injuries, and related surgeries, overlap in both the Rivera Lawsuit
10 and the Traffic Lawsuit. Kaplan claims to have injured his back avoiding the Riveras’ dog on
11 March 18, 2009. Exhibit 2, 15:20–16:9. He received surgery on his back related to this purported
12 injury on March 16, 2010. Exhibit 2, 23:14-15. On May 5, 2010, he told his doctor that his
13 symptoms had reduced by 90%. Exhibit 2, 24:9-12. However, the night before Kaplan told his
14 doctor about the 90% reduction in his symptoms, Kaplan was involved in the alleged traffic
15 accident. Exhibit 3 at 3:17-18. A month later, in June 2010, Kaplan lowered his recovery from 90%
16 reduction in symptoms to 30% reduction in symptoms. 24:23-25:1. How much of this reduction is
17 attributable to the traffic accident is unclear and, based on the testimony from Kaplan’s surgeon,
18 may be impossible to determine. Exhibit 2, 28:24–29:4.

19 Furthermore, Kaplan claims \$300,000.00 in medical expenses in the Rivera Lawsuit and
20 \$280,000.00 in medical expenses from the Traffic Lawsuit, but he has failed to compute any of
21 those damages for the Riveras as required by FRCP 26(a)(1)(A)(iii).¹ Without question, based on
22 Kaplan’s Pretrial Disclosures, Kaplan is claiming medical expenses from the Riveras related to the
23 second, post-traffic accident surgery. *See* Plaintiff’s Pretrial Disclosures, attached as Exhibit “5,” at
24 4:8-9 (“Medical Records pertaining to Plaintiff’s second surgery at St. Mary’s Hospital pertaining
25 to the second cyst after the motor vehicle accident.”).

26
27
28 ¹ As FRCP 26(a)(1)(A) disclosures are not filed with the Court and are therefore not public record,
the Riveras do not have access to what damages computations, if any, Kaplan has provided in the
Traffic Lawsuit.

1 Despite a clear overlap between his injuries, and the extreme likelihood that the second
 2 surgery was caused primarily by the traffic accident, Kaplan is seeking damages from the Riveras
 3 for both surgeries. Based on his allegations in the Complaint and the dollar amount of claimed
 4 damages in the Traffic Lawsuit, Kaplan appears to be claiming the same medical costs for both
 5 surgeries in the Traffic Lawsuit as well. Without question, there are significant overlapping medical
 6 expenses in both cases, necessitating consolidation.

7 **ii. Kaplan's lost wages also overlap between the two lawsuits.**

8 To begin, Kaplan claims lost wages in the Rivera Lawsuit. In his First Amended Complaint,
 9 Kaplan claims \$26,250 in lost wages against the Riveras; these are calculated as \$350.00 of weekly
 10 income lost over the course of 75 weeks. Exhibit 1, 5:13-16. Kaplan testified at his deposition that
 11 he calculated these lost wages from the date of the dog incident forward. *See* Deposition of David
 12 Kaplan, attached as Exhibit "6," at 17:17-24. Kaplan also claims lost wages in the Traffic Lawsuit.
 13 Calculating this period of claimed lost wages forward from the date of the dog encounter shows a
 14 significant overlap between the two lawsuits: seventy-five weeks after March 18, 2009 is August
 15 25, 2010 – over three months, or approximately sixteen weeks, *after* the May 4, 2010 accident
 16 described in the Traffic Lawsuit.²

17 However, this overlap is likely much greater than just sixteen weeks. In his deposition,
 18 Kaplan testified that he was actually disabled for longer than 75 weeks, but that he only made that
 19 allegation in his complaint because "at the time [he] prepared the complaint, that's what [he]
 20 believed the disability period to be," and that he now believes that "disability period" to be longer.
 21 Exhibit 6, 18:22–19:3. Kaplan did not explain what he meant by "disability period." *Id.* Kaplan also
 22 testified that he performed tax preparation work for one client through "April 2009" (Exhibit 6,
 23 31:24–32:1), for another client "in the early part of 2010" and, for several other clients, in 2012
 24 "and all of the preceding years," indicating that his alleged disability period was neither continuous
 25 nor a total prohibition on his work. Exhibit 6, 30:19–31:8.

26
 27
 28 ² In the Traffic Lawsuit, Kaplan claims \$48,000 of lost wages; based on the weekly income claimed
 in the Rivera Lawsuit, this is 137.1429 weeks of lost wages. Exhibit 3, 5:2-5.

Kaplan is suing both the Riveras and the defendants in the Traffic Lawsuit for lost wages, but Kaplan's own testimony shows a serious overlap in those damages between the two suits. By his own admission, Kaplan's purported lost wages claim against the Riveras extends far beyond the date of the alleged traffic accident. His statements that he did continue to work during this period, combined with the claim that his "disability period" was longer than 75 weeks, indicates a high likelihood of an even greater overlap in claimed damages between the two lawsuits. This serious overlap in claimed damages mandates consolidation.

iii. Kaplan is suing the Riveras for damage to his vehicle in the traffic accident.

Finally, Kaplan is unquestionably attempting to hold the Riveras liable for damage his vehicle incurred in the accident described in the Traffic Lawsuit. In his Pretrial Disclosures, Kaplan identifies a "repair estimate pertaining to May, 2010 Motor Vehicle accident" as documents he expects to offer in the Rivera Lawsuit. Exhibit 5, 4:15 and 4:25. Kaplan has never produced these documents to the Riveras, a clear violation of his duties under FRCP 26(a)(1)(A). Declaration of Larry Nelson, Esq.

The Riveras have absolutely no liability to Kaplan for damages to his vehicle related to the traffic accident. That Kaplan is claiming those damages from them again emphasizes how significantly the factual issues of damages overlap in the Rivera Lawsuit and the Traffic Lawsuit.

B. Defendants will be Seriously Prejudiced if the Lawsuits are Not Consolidated.

The next factor for the district court to consider is whether there will be any prejudice from consolidating, or failing to consolidate, the two lawsuits. *Paxonet Communications, Inc. v. TranSwitch Corp.*, 303 F.Supp.2d at 1028. As described in detail above, Kaplan is unquestionably suing the defendants in the Rivera Lawsuit for damages related to the Traffic Lawsuit. The reverse is also quite likely, as Kaplan claims to have incurred nearly identical amounts of medical costs in both lawsuits: \$300,000.00 in the Rivera Lawsuit and \$280,000.00 in the Traffic Lawsuit.³ As it is

³ Tellingly, Kaplan's total claimed damages in both lawsuits are less than two thousand dollars apart: when the damages for both medical expenses and lost wages are combined, Kaplan is seeking \$326,250.00 in the Rivera Lawsuit and \$328,000.00 in the Traffic Lawsuit. In his pending bankruptcy, in which both the Rivera Lawsuit and the Traffic Lawsuit were initially filed, Rivera claims a total of \$334,057.17 in outstanding liabilities; based on his most recent list of creditors

1 already explicitly clear that Kaplan is suing the Riveras for expenses he incurred as a direct result of
 2 the alleged traffic accident, this extreme similarity in medical expenses – combined with Kaplan’s
 3 utter failure to provide any type of computation of each category of claimed damages – indicates a
 4 high likelihood that Kaplan is suing all defendants in both lawsuits for the total amount of damages
 5 he has purportedly suffered, regardless of the source. If such overlapping damages were to be
 6 evaluated separately, in two entirely different trials, the probability of prejudice against the
 7 defendants arising out of inconsistent judgments is extremely high.

8 Kaplan’s own medical expert has testified that Kaplan’s second surgery was likely the result
 9 of the alleged traffic accident, though he freely admitted that he could not determine which incident
 10 – if either of them at all – was the cause of Kaplan’s claimed back injuries. Exhibit 2, 29:5-8. This
 11 uncertainty puts the defendants in both the Rivera Lawsuit and the Traffic Lawsuit in a very
 12 difficult position, as the finders of fact in each case could reach wildly different conclusions about
 13 allocating damages between the two sets of defendants.

14 The only way to avoid these incompatible judgments would be to try the two cases together,
 15 ensuring that the finder of fact properly allocates any awarded damages between the two sets of
 16 defendants. To do otherwise would be to invite prejudice against the defendants, and possibly
 17 against Kaplan, arising out of two incompatible and inconsistent awards.

18 ***C. Judicial Convenience Mandates Consolidation.***

19 A third factor for the court to consider in consolidation is judicial convenience. *Paxonet*
 20 *Communications, Inc.*, 303 F.Supp.2d at 1028. Both the Rivera Lawsuit and the Traffic Lawsuit are
 21 currently pending before this very court. *See* Acknowledgement of Case Transfer [Traffic Lawsuit]
 22 filed March 22, 2013, attached as Exhibit “9.” Consolidating these two cases would ensure that this
 23 court does not hold two separate trials on identical damages claims.

24 ***D. There is Little Potential for Confusion or Delay.***

25 The final factor for this court to weigh is whether there could be confusion or delay caused
 26 by consolidation. *Paxonet Communications, Inc.*, 303 F.Supp.2d at 1028. Because the facts that

27 and debts owed, less than \$8,000.00 of these debts are related to medical expenses. *See* Amendment
 28 Cover Sheet filed August 9, 2011, attached as Exhibit “7,” at p. 3; Form 6 Schedules filed on
 December 23, 2010, attached as Exhibit “8”, at p. 10, p. 13-35.

1 give rise to both lawsuits are so simple – a brief encounter with a dog and a rear-end traffic accident
2 – the likelihood of confusion on those issues is very low. Similarly, the likelihood of confusion on
3 the damages issues is also minimal, as the finder of fact in the consolidated action will be able to
4 hear the entire sequence of injuries and damages claimed by Kaplan, including testimony from
5 those persons who treated Kaplan for both purported injuries at the same time, and can allocate
6 blame among the parties accordingly. On the other hand, if the two cases were to be tried
7 separately, the finder of fact in the Rivera Lawsuit would repeatedly hear discussions about the
8 traffic accident without having the benefit of testimony from the actual participants in that accident.
9 Similarly, the finder of fact in the Traffic Lawsuit would hear reference to the dog encounter
10 without the benefit of a full explanation of the circumstances surrounding that incident. This would
11 likely create far more confusion in the finder of fact than consolidation of the two lawsuits ever
12 would.

13 Finally, the likelihood of delay is minimal. Discovery has already opened in the Traffic
14 Lawsuit and is presumably ongoing. *See* Joint Report of the Parties' Initial Conference, filed in the
15 Traffic Lawsuit on June 3, 2013, attached as Exhibit "10." Pretrial disclosures are due in that case
16 in December 2013. *Id.* As the Rivera Lawsuit is scheduled to begin trial in August 2013, delaying
17 that trial until the Traffic Lawsuit is scheduled should only be a delay of a few months. This is an
18 insignificant delay in light of the multitude of factors weighing in favor of consolidation.

19 **IV. Conclusion**

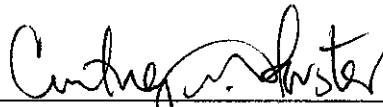
20 Consolidation of these two cases is the only way to ensure that any damages Kaplan has
21 allegedly suffered are properly, and fairly, allocated between the defendants in the Rivera Lawsuit
22 and the Traffic Lawsuit. As the two cases currently stand, the claimed damages are inextricably
23 intertwined: Kaplan has freely admitted that he is seeking damages from the Riveras related to his
24 purported traffic accident. His own treating physician has testified that he cannot readily distinguish
25 between injuries caused by the dog encounter and those caused by the traffic collision. Kaplan
26 appears to be claiming lost wages for the exact same time period from both the Riveras and the
27 Traffic Lawsuit defendants. This extreme level of overlap between two separate lawsuits is very
28

1 likely to result in two incompatible verdicts, prejudicing all parties involved and wasting this
2 Court's judicial resources. For these reasons, the two lawsuits must be consolidated.

3 DATED this 25 day of July, 2012.

4 GUNDERSON LAW FIRM

6 By:



7 Mark H. Gunderson, Esq.

8 Nevada State Bar No. 2134

9 Courtney G. Forster, Esq.

10 Nevada State Bar No. 10775

11 Attorneys for Vadonna & Jeffrey Rivera

CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of the law office of GUNDERSON LAW FIRM, and on the 25 day of June, 2013 I e-filed the **MOTION TO CONSOLIDATE** and a copy will be electronically mailed by the United States District Court-District of Nevada through CM/ECF to the following:

Bradley P. Elley, Esq. – bpelelaw@sbcglobal.net
Douglas R. Rands, Esq. – drands@rsgnvlaw.com

Pursuant to NRCP 5(b), I certify that I am an employee of the law office of GUNDERSON LAW FIRM, and that on the 25 day of June, 2013, I deposited for mailing in Reno, Nevada, a true and correct copy of the **MOTION TO CONSOLIDATE**, addressed to:

David John Kaplan
7455 Desert Plains Drive
Sparks, NV 89436


Brandy Ellison

EXHIBIT LIST

Exhibit #	Description
Exhibit "1"	First Amended Complaint (Rivera)
Exhibit "2"	James Rappaport Deposition Transcript
Exhibit "3"	Complaint (Connell)
Exhibit "4"	Kaplan's Initial Disclosures (Rivera)
Exhibit "5"	Kaplan's Pretrial Disclosures (Rivera)
Exhibit "6"	David John Kaplan Deposition Transcript
Exhibit "7 "	BK "Amendment Cover Sheet" filed 8/9/2011
Exhibit "8"	BK Form 6 Schedules filed 12/23/2010
Exhibit "9"	Acknowledgment of Case Transfer filed 3/22/2013
Exhibit "10"	Joint Report of the Parties Initial Conference (Connell) filed 6/3/2013